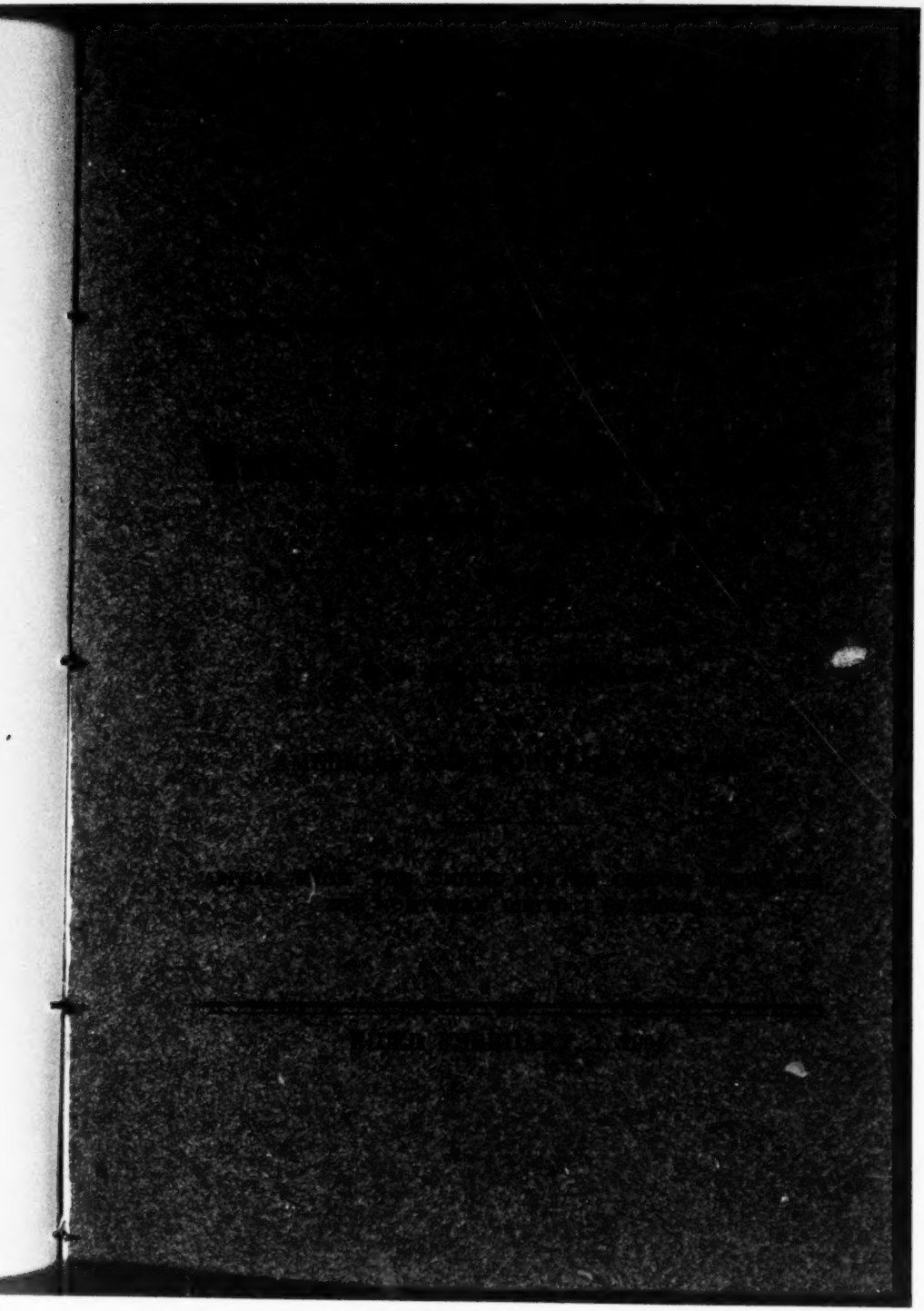

United States Supreme Court

OCTOBER TERM, 1903

No. 357

W. S. KIRBY, APPELLANT,

vs.

AMERICAN SODA FOUNTAIN COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS

I

MOTION BY APPELLEE TO DISMISS APPEAL ALLOWED FROM THE DECREE OF SAID CIRCUIT COURT, ENTERED IN SAID CAUSE ON THE TWENTY-SEVENTH DAY OF MAY, 1903, AND TO AFFIRM SAID DECREE.

And now comes the appellee by John J. Weed, its attorney, and moves the Court to dismiss said appeal, and affirm said decree, because, and for the reason, that the value of the amount in dispute in said cause, is not within the appellate jurisdiction of this court; and to affirm said decree for the reason that it is manifest from the record that this appeal was taken for delay only; and that the question on which the jurisdiction of this court depends, is so frivolous as not to require further argument.

II.

Statement of Facts Shown by the Record

The plaintiff, and appellant, on the 16th day of May, 1901, filed his petition against the defendant in the 14th Judicial District Court of Dallas county in the state of Texas, in which he averred that on the twenty-sixth day of October, 1900, he was the owner of a certain soda fountain apparatus of the value of five thousand dollars; and that on said date, the defendants represented to the plaintiff, that it had a certain soda fountain, at some distant point, but which was not then exhibited to the defendant, which was excellently constructed, and of very superior style and appearance; of good workmanship and material, and superior in style, appearance and value to the said soda fountain apparatus owned by the plaintiff.

That the plaintiff relying on the representations of the defendant, delivered his soda fountain to the defendant; and that the said soda fountain delivered by the defendant to the plaintiff, was not of the same description or value of the soda fountain which the plaintiff delivered to the defendant; but was of less value than the one delivered by the defendant to the plaintiff in the sum of fifteen hundred dollars; and that by reason of the promises and the breach by the defendant of its agreement to deliver such a soda fountain apparatus as it contracted, the plaintiff has been damaged in the sum of fifteen hundred dollars.

Record pages 1 and 2.

Second. That citation was issued in said cause on the eighteenth and served on the defendant on the twentieth of May, 1901.

Record pages 4 and 5.

Third. That at the term of said court, held thereafter, and in September, 1902, the defendant filed a demurrer to the plaintiff's original petition, and also a denial of each and every allegation thereof.

Record page 4.

Fourth. On the twelfth day of December, 1901, the plaintiff filed by leave of the court, his first amended original petition, and sets out more fully and in detail the agreement between the plaintiff and defendant for the sale of said soda fountain; and avers "that by reason of the exchange effected through the fraudulent and deceitful conduct of the defendant, and on account of the inferior apparatus furnished by the defendant to the plaintiff, the defendant, has become liable, and promised to pay to the plaintiff the sum of two thousand five hundred dollars; and that though payment thereof has been demanded by the plaintiff, of the defendant, the defendant has wholly failed to pay the same, or any part thereof, to the damage of the plaintiff, of the said sum of two thousand five hundred dollars; and that the obligation of the plaintiff to pay the defendant the sum of two thousand and twenty-five dollars' as difference according to said contract be cancelled, and that the plaintiff have and recover of and from the defendant the sum of two thousand five hundred dollars, and costs, and such other and further relief as he may be entitled to in the premises.

Record pages 5, 6, 7, 8, 9.

Fifth. On the twenty-second day of January, 1902, the defendant filed its petition for the removal of said cause from the state court, in which the same was pending, being the 14th Judicial District Court of Dallas county, Texas, to the circuit court of the United States for the northern district of Texas, upon the ground and for the reason that the amount claimed by the plaintiff was two thousand five hundred dollars; and that the controversy in said suit, is, and was at the commencement thereof, wholly between citizens of different states; and the defendant was, at the date of commencement of this suit, and still is an inhabitant and citizen of the state of New Jersey, and a non-resident of the state of Texas; and that the plaintiff was, and still is a citizen of the county of Dallas, and state of Texas.

Record pages 9 and 10.

Sixth. The defendant having executed its bond for costs of removal, the petition for the removal thereof was granted; and the clerk of the district court of Dallas county, Texas, was ordered to make out a transcript of the record in said cause, to be filed in the circuit court of the United States, for said Northern district of Texas, and this was done.

Record pages 11 and 12.

Seventh. The defendant, on the twelfth of May, 1902, filed in said cause, its demurrer, answer and cross-complaint to the original, and amended petition filed by the plaintiff; and in said pleadings, objections are made to the plaintiff's original and amended petition, and a denial of all the material allegations of each of said petitions are made under oath; and in the cross-complaint filed by the defendant, the terms and stipulations of the contracts between the plaintiff and the defendant, are stated and set forth in full according to their terms; and a demand or prayer by the defendant for the enforcement of its mortgage lien on the soda fountain sold to the plaintiff, by the defendant, amounting to the sum of *seventeen hundred dollars* with interest thereon at the rate of five per cent from the first day of April, 1901.

Record pages 13 to 30.

Eighth. On the twentieth of June, 1902, the plaintiff moved to transfer the cause to the law docket; and on the same date, by leave of the court, he dismissed his suit.

Record page 31.

Ninth. On the twenty-fourth day of July, 1902, the plaintiff, who was defendant in the cross-bill, or cross-complaint, filed his plea to said cross-complaint; and he averred therein as his only defense to said cross-complaint, "that the original bill filed by him has been dismissed; and that the cross-bill filed by the defendant, is not within the jurisdiction of said court, *because* the amount, under the allegations of said cross-bill, does not exceed exclusive of interest and costs, the sum or value of two thousand dollars; and that the plaintiff in said

cross-bill, seeks therein for a recovery against the defendant in said cross bill of a sum less than two thousand dollars, exclusive of interest and costs which said sum exclusive of interest and costs, sought to be recovered in said cross-bill, is the sum of seventeen hundred dollars only, which is the only matter or amount in dispute, in said cross-bill, or cross complaint.

Record page 32.

Tenth. On the thirteenth day of February, 1903, the plea to the jurisdiction of the court, which the plaintiff had filed to the defendant's cross-bill, was argued, and over-ruled by the court; and the plaintiff, the defendant in the cross-bill, was ordered to file an answer to said cross-bill on or before the the rule-day of said court occuring in April, 1903.

Record page 34.

The *subpœna* to answer the cross-bill was served on the defendant in that bill on the twelfth day of May, 1902.

Eleventh. On the twenty-first of April, 1903, no further answer or plea to said cross-bill having been interposed by the defendant therein, a decree *pro confesso* was rendered against the plaintiff in said suit; he being the defendant in the cross-bill.

Record pages 34, 35.

Twelfth. A final decree for the payment by the defendant in the cross-bill, being the plaintiff in the original bill, to the defendant in the original bill, and the plaintiff in the cross-bill, was rendered by the circuit court, after a hearing on the merits, on the twenty-seventh day of May, 1903, for the sum of eighteen hundred and eighty-three dollars, and twenty-nine cents, ($1,883.29), and the decree finds that the allegations of the defendant's cross-complaint and exhibits thereto are true; "and that the said W. S. Kirby is justly and truly indebted to the defendant, the American Soda Fountain Company, in the sum of seventeen hundred dollars ($1,700.00] with interest thereon at the rate of five per cent from April

first, 1901, said principal and interest amounting to the sum of eighteen hundred and eighty-three dollars and twenty-nine cents [$1,883.29], and that a valid mortgage existed on April first, 1901, and does now exist in favor of the American Soda Fountain Company to secure the payment of said sum of eighteen hundred and eighty-three dollars and twenty-nine cents [$1,883.29] on the property described in the decree, now in possession of said W. S. Kirby at his store in the city of Dallas, Texas; and the decree further provided that upon default being made by said Kirby, in the payment of said sum as provided in said decree, the said soda fountain upon which the said Kirby had executed a mortgage to the plaintiff in said cross-bill, should be sold, and the proceeds of the sale thereof applied to the payment of the indebtedness due from said Kirby to the American Soda Fountain Company as found by said decree.

Record pages 35, 36, 37.

Thirteenth. An appeal from said decree to this court was prayed by the appellant, and allowed on the tenth day of June 1903, and in the order allowing said appeal it is certified as follows:

"That this appeal is granted solely upon the question of jurisdiction which is set forth in the foregoing petition for appeal, is certified to the Supreme Court of the United States, in order that the Supreme Court may properly determine the question of jurisdiction—no other question having been tried in the circuit court."

Record pages 37, 38.

Assignment of Errors

III.

The errors assigned by the appellant are as follows:

First. The court had no jurisdiction to render the decree on the cross-bill, after the original bill had been dismissed

with leave of the court, without prejudice, *for the lack of jurisdictional amount in controversy.*"

Second. The circuit court should have sustained the plaintiff's plea to the jurisdiction interposed against the cross-bill; and dismissed the cross-bill.

IV.

The assignments of error are not sufficient to defeat the right of the appellee to have an order, dismissing this appeal for want of jurisdiction for the following reasons:

First. Because the circuit court had jurisdiction of the subject matter of the suit set forth in appellant's original and amended petitions or bills of complaint; as well as the matters stated set forth and charged in the defendant's cross-bill.

Second. Because the defendant having filed a cross-bill, or cross-complaint by leave of the court, could not be deprived of its right to have a hearing of the matters and things stated and charged in said cross-bill and to have a decree thereon even if the plaintiff or complainant in the original suit, had, with the leave of the court, dismissed the original petition, or bill before the hearing of the matters alleged in the cross-bill, and the decree thereon rendered in favor of the appellee.

Third. There was no error in the decision of the circuit court over-ruling the plaintiff's plea to the defendant's cross-bill, and in refusing to dismiss said cross-bill.

V.

Legal Propositions, Authorities and Arguments

A. The United States Circuit Court for the northern district of Texas, had jurisdiction of the suit commenced by the plaintiff in the 14th Judicial District Court of Dallas county Texas, by reason of the removal of said cause from said state court, to the United States circuit court for said district.

The plaintiff, both in his original, and in his first amended

petition, states a case which was within the jurisdiction of said circuit court, for the reason that the case stated in the proceedings in said cause, showed that the controversy involved therein was between citizens of different states, and the value of the amount in dispute, and sought to be recovered by the plaintiff, exceeded the sum of two thousand dollars, exclusive of interest and costs.

The value of the matter in dispute in this suit at the time the decree was rendered by the circuit court, was the damages the plaintiff claimed in his first amended petition and sought to recover from the defendant by reason of a breach of a contract made between the plaintiff and defendant on the twenty-sixth day of October, 1900, and filed in said court as part of the plaintiff's petition, or bill of complaint, on the twelfth day of December, 1901. The plaintiff's damages, as stated in his pleadings, are claimed to have been two thousand five hundred dollars, and this sum was sufficient to confer jurisdiction on the district court. The sum of seventeen hundred dollars was demanded from the plaintiff, by the defendant, in his cross-bill, or cross-complaint, filed in said cause, on the twelfth day of May, 1902. The aggregate of these two amounts, as showing the amount in dispute, in said suit, at the time the decree was made, was therefore *four thousand two hundred dollars;* and this sum was sufficient to invest the circuit court in which said suit was pending, with complete jurisdiction to hear said cause and to render a decree therein, either upon the original or cross-bill.

Jurisdiction of the Circuit Court

The act of August thirteenth, 1888, provided on this subject ts follows:

"That the circuit courts of the United States shall have cognizance concurrent with the courts of the several states of all suits of a civil nature, at common law, or in equity; *where the matter in dispute exceeds, exclusive of interest and costs, the sum or*

value of two thousand dollars, in which there shall be a controversy between citizens of different states."

Supplement of United States Statutes, Vol. II, second edition, 611.

The rule for the determination of the value, or amount in dispute, in order to give to this court jurisdiction of appeals or writ of error from the circuit court, is stated by Chief Justice Marshall, in Gordon vs. Ogden, 3 Peters, 33, 34, is as follows:

"If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due, may still be recovered, should the judgement for a smaller sum be recovered, and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action the judgement of this court can only affirm that of the circuit court; and consequently the matter in dispute cannot exceed the amount of that judgement. Nothing but the judgement is in dispute between the parties."

This appeal is prosecuted by the plaintiff in the circuit court and the principles above stated must be applied to the determination of this motion.

The principles in regard to the appellate jurisdiction of this court where "the amount or value of the matter in dispute" between the parties in the circuit court, determines the jurisdiction of this court, are asserted in numerous cases, where that question has been considered and decided; and the cases which have resulted from the discussion of that question by this court will be cited and referred to under *two* classes as follows:

First. Those which involved the construction of the *twenty-second* section of the Judiciary Act of 1789 under which the circuit court had jurisdiction where the matters in dispute in that court was *five hundred dollars;* and the right of appeal or writ of error was given to this court where the judgement or decree exceeded the sum of two thousand dollars exclusive of interest and costs.

Second. Those which involved the construction of the act

of August 13th, 1888. "The amount of the matter in dispute requsite to give this court jurisdiction on appeal or writ of error under that act, was increased from a sum exceeding two thousand dollars, to a sum or vaule exceeding *five* thousand dollars, exclusive of interest and costs.

18th Statutes-at-Large, 315.

(*a*) *This appeal must be dismissed on the authority of the decisions of this court in its construction of the twenty-second section of the Judicial Act of* 1789.

Under that act, the value of the amount in dispute *in this court*, in order to give jurisdiction on appeal or writ of error was two thousand dollars.

The authorities which give construction to that act are as follows:

Scott *vs.* Lunt, admr., 6 Peters, 349.
Smith *vs.* Honey, 3 Ibid, 143.
Meredith *vs.* John McKee, 1 Ibid, 248.
Oliver *vs.* Alexander, 6 Ibid, 143.
Spear *vs.* Place, 11 How, 523.
Rich *vs.* Lambert, 12 How 348.
Walker, *et al.*, *vs.* United States, 4 Wall, 163, 165.

In the last of above cases the Court, Chief Justice Chase delivering the opinion, used the following language:

"It has been a good deal controverted whether the sum or value in controversy is to be determined by reference to the amount claimed, or the amount of the judgement, or the amount in dispute in this court. It has been long settled, however, that when the judgement is for the defendant, or the plaintiff, *and for less than two thousand dollars, and the plaintiff sues out the writ of error*, this court has jurisdiction if the damages claimed in the declaration exceed that sum; but that if the judgement is for the plaintiff, and not more than two thousand dollars, and the defendant prosecutes in error, this Court has not jurisdiction, *for the amount in controversy, as to the defendant, is fixed by the judgement.*

The record in this case shows that the decree was rendered in favor of the plaintiff in the cross-bill against the defendant in the said bill, who was the plaintiff in the original and amended bills. The principles declared in that case are sufficient to justify the appellee, in making this motion, and contending for the dismissal of said appeal even if the 22nd section of the Judiciary Act were still in force.

(*b*) The only effect of the passage of the act February 16, 1875, as amended and corrected by the act of August 13th, 1888, so far as it affected the appellate jurisdiction of this Court was to provide that after May 1st, 1875, the value of the matter in dispute in the circuit court, should be five thousand dollars, in order that this court might have appellate jurisdiction of judgements or decree of that court rendered subsequent to the date when that act took effect.

In its construction of that statute this Court has declared in numerous cases that it cannot entertain jurisdiction of judgements or appeals from the circuit court unless the amount in dispute exceeds that sum.

Telegraph Co. *vs.* Rogers, 93 U. S. 565, 567.
Shacker *vs.* Insurance Co., 93 U. S., 241, 242.
Thompson *vs.* Butler, 95 Ibid, 604, 607.
Parker *vs.* Morrill, 106 U. S., 1, 2.
Elgin *vs.* Marshall, 106 Ibid, 578, 583.
Troy *vs.* Evans, 97 Ibid, 1, 3.
N. Y. Elevated R. R. *vs.* Fifth National Bank, 118 U. S., 608.
Gibson *vs.* Shufeldt, 122 Ibid, 27.
Steamship Co. *vs.* Merchant, 133 Ibid, 375.
Wetmore *vs.* Rysner, 169 Ibid, 115;
Coffrey *vs.* Oklahoma Territory, 177 Ibid 346.

These authorities further justify the appellee in making this motion, and require the court to dismiss this appeal, unless the plea to the jurisdiction of the court, interposed by the plaintiff, to the defendant's cross-bill, shall be held to have put an end to the jurisdiction of the circuit court to entertain said

cross-bill, after the original and amended bills filed by the complainant had been dismissed.

It is certain as a legal proposition that the order of the court giving the plaintiff leave to dismiss his original and amended bills, did not dismiss the defendant's cross-bill, nor deprive the court of jurisdiction to hear, determine, and decree in respect to the matters stated in that bill. The plaintiff's original and amenned bills, and the defendant's answer and cross-complaint constituted the case, of which the circuit court had acquired jurisdiction by the voluntary action of the parties; and it was not within the power of either party, to deprive his or its contestant of the right to have a judicial determination of all the questions involved in the final decision of the judicial controversy presented in the case under the pleadings. The issues involved were neither uncertain nor doubtful. The plaintiff asserted damages under a written contract which he alleged had been obtained by the defendant by fraud and he asserted the right to have the contract delivered up and canceled and to be awarded damage for the deceipt and fraudulent representations of the defendant in making the contract, and to have damages on that account, to the amount of two thousand five hundred dollars. The defendant filed its answer and cross-complaint, and demanded an affirmation of the contract with the defendant; a decree for the payment of the balance due and payable on the contract, and an enforcement of the lien, it had under the contract, for the payment of the balance payable by the defendant in the cross-complaint, who is the appellant here. The defendant in the cross-bill could neither impair nor defeat the right of the plaintiff in that bill, to have the relief prayed therein by dismissing the original and amended bills, out of, and by reason of which the cross-bill came to be a part of the case made by the pleadings.

This proposition is very clearly stated by Judge Caldwell, in the case of Lowenstein *vs.* Glidewell, 5 Dill, 325, where the following language was used:

"Whether the dismissal of the original bill carries with it the cross-bill depends upon the character of the latter. If the cross-bill sets up matters purely defensive to the original bill and prays for no affirmative relief, the dismissal of the latter necessarily disposes of the former. But where the cross-bill sets up as it may, additional facts not alleged in the original bill, relating to the subject matter, and prays for affirmative relief against the plaintiff in the original bill in the case thus made, *the dismissal of the original bill does not dispose of the cross-bill but it remains for disposition in the same manner as if it had been filed as an original bill.*"

The result of the reasoning and decisions upon this question with the authorities by means of which the conclusion of Judge Caldwell is reached, is stated in Daniel's Chancery Practice, Vol. 2, page 1553, 5th edition, note 3, as follows:

"If the cross-bill sets up matter purely defensive, and prays for no affirmative relief, the dismissal of the original bill necessarily disposes of the cross bill; but where the latter sets up, as it may, additional facts not alleged in the original bill, relating to the subject matter, and prays for affirmative relief against the plaintiff in the original bill, on the case just made, *the dismissal of the original bill does not dispose of the cross-bill; but it remains for disposition as if it had been filed as an original bill.*"

The Appeal is Frivolous and Should be Dismisssed for that Reason

The facts appearing in this record justify that statement; and the court is authorized to determine from the whole record whether the appellant is entitled to special consideration in the attitude in which he is revealed to the court by this record.

He commenced this suit in the state court, Dallas County, Texas, on May 16th, 1901, and he claimed in his original and amended petition, or complaint, the sum of two thousand five hundred dollars, as damages that he avers he sustained by the

non-performance of a contract made between him and the appellee on the twenty-sixth day of October, 1900.

The appellee filed a demurrer to said complaint as well as a denial of each of the allegations of said original petition, or complaint, at the term of the said court held in September, 1901; and the appelle afterwards, on the twelfth day of December, 1901, filed his first amended petition.

The cause was removed from the district court of Dallas county on the petition of the appellee, filed January 22, 1902, to the United States circuit court for the northern district of Texas.

The appellee on the twelfth day of May, 1902, filed its demurrer, answer and cross-complaint to the original and amended petition of appellant; and in its cross-complaint sought to recover from the appellant the sum of seventeen hundred dollars, with interest from April 1st, 1901, which remained due and payable from the appellant on the contract set out in the original and amended petition filed by the appellant in the state court, and to have a decree for the enforcement of the lien on the property sold by the appellee to secure the payment of the balance due from the appellant.

On the twentieth day of June, 1902, the appellant moved to transfer the case to the law docket, and also moved for leave to dismiss his original and amended petitions; and said petitions were dismissed.

On the twenty-fourth day of July, 1902, the appellant filed his plea to defendant's cross-complaint; and denied the jurisdiction of the court to entertain or consider the same, because the appellant having dismissed his original and amended petition the amount demanded by the appellee under the allegations of the cross-complaint, was less than two thousand dollars, to-wit: the sum of seventeen hundred dollars.

On the thirteenth day of February, 1903, the plea to the jurisdiction of the court which denied the authority of the court to entertain said cross-bill, was argued and over-ruled; and the appellant ordered to make further answer thereto, on or before the rule-day of said court occurring in April, 1903.

On the twenty-first day of April, 1903, the cross-bill was taken *pro-confesso* for want of an answer to said bill by the appellant and the appellant making no further defense to that bill by answer or otherwise a decree was made thereon in favor of the appelle for the amount above stated, on the twenty-seventh day of May, 1903; and from that decree this appeal is prosecuted.

The original and amended bills, and the defendant's cross-bill, was a legitimate and logical product of the appellant's original and amended bills; and the circuit court was authorized to examine these bills in considering the sufficiency of the cross-bill, even if the appellant had notified the circuit court that he would take nothing by said bills by withdrawing them from the consideration of the court, by having them dismissed. The cross-bill filed by the appellee was an auxiliary suit; and dependent upon the original suit; and can be sustained because the subject matter of the appellant's original and amended bills stated a case within the jurisdiction of the circuit court; and it neceesarily follows therefore that the circuit court had the right in determining the sufficiency of th plea filed by the appellant to the cross-bill, to consider the averments of the original and amended bills which were of record at the time the cross-bill was filed. At that time the original and amended bills were pending in the circuit court; and as the cross-bill related to grow out of, and was germain to the purposes and objects of the original and amended bill the circuit court in determining the sufficiency of the plea to the jurisdiction interposed by the plaintiff to the cross-bill, might with propriety consider the statements and purposes of the original and amended bill.

It is so certain as not to require serious or elaborate discussion, that if the circuit court had jurisdiction of the original and amended bill, it had jurisdiction of the cross-bill filed by the defendant to the original bill, against the plaintiff in that bill for the purpose of procuring a complete determination of a matter already in litigation; and this is what the cross-bill proposed to accomplish.

It is evident the plaintiff lost all interest in or desire to

have any hearing of the case he had instituted against the defendant as soon as the defendant put on record by demurrer, answer, and cross-bill, its defenses to said original and amended bills.

The defendant's demurrer, answer and cross-complaint, was filed on the twelfth day of May, 1902; and the plaintiff dismissed his suit on the twentieth day of June, 1902.

The record furnishes most satisfactory evidence that the plaintiff in the circuit court, and the appellant here had no desire to have any examination into the merits of the suit he had instituted against the appellee, in the district court of Dallas county; for as soon as the defense to that suit was disclosed by the answer and cross complaint of the defendant he dismisses the suit, to which the defendant had made its answer, and filed its cross-bill; and attempts to defeat the right of the defendant to the relief prayed in its cross-bill, by filing a plea, to the jurisdiction of the court to entertain the cross-bill, only because the appellant had dismissed the original and amended bill, to which he had summoned the appellee to make answer.

The plaintiff's plea to the defendant's cross-bill was properly overruled because that bill was an incident of and resulted from the original and amended bills which the plaintiff had filed. The circuit court had jurisdiction of those bills. The objection to the cross-bill, contained in the appellant's plea, had no support in any legal theory applicable to the bill so long as the original and amended bills remained a part of the record. Those bills contained sufficient allegations to give the circuit court jurisdiction of those bills filed by the appellant, by reason of the citizenship of the parties and the value of the subject matter in controversy. The cross-bill was between the parties to the original and amended bill, and relates to the subject matter of those bills. It was designed to aid in the final settlement of the controversy to which the appellant had made the appellee a party. The dismissal of the original and amended bills was a *trick* by means of which the appellant proposed to terminate the controversy without

any hearing on the merits; and there was no such hearing until subsequent to the dismissal by the appellant of his bills of complaint. The appellant had the right to have such hearing by making answer to the cross-bill or by retaining the original and amended bills for hearing. The record, submitted for the consideration of the court in the determination of this appeal, justifies the statement that the appellant is indebted to the appellee in the amount of the decree made by the circuit court against the appellant; and that there is no defense against the amount of said decree, except that which is involved in the determination of the following questions:

1st. Had the circuit court jurisdiction to hear and determine the original and amended bills filed by the appellant against the appellee in the 14th judicial circuit court of the State of Texas, and removed therefrom to the United States circuit court for the northern district of Texas?

2nd. Did the dismissal by the appellant, of his original and amendeded petitions, *subsequent to the filing by the appellee of its cross-bill deprive the circuit court of its jurisdiction to entertain the cross-bill and make a decree thereon in favor of the appellee?*

It is obvious that the answers given to these questions by the judge of the circuit court in his decision over-ruling the appellant's plea to the cross-complaint, and in his decree in favor of the appellee for the amount found payable by the appellant to the appellee are so conclusive as not to need further argument; and this court upon the examinations of the record, must conclude that this appeal was taken for delay only, and that the question on which the jurisdiction of the court depends is so frivolous as not to need further argument." The following authorities justify these contentions.

Whitney *vs.* Cook, 99 U. S., 607.
Hinckley *vs.* Morton, 103 Ibid, 764.
Micas *vs.* Williams, 104 Ibid, 556.
Swope *vs.* Leffingwell, 105 Ibid, 3.
Chanute City *vs.* Trader; 132 Ibid, 210.
Davis *vs.* Corbin, 113 Ibid, 687.
Walston *vs.* Nevin, 128 Ibid, 578.

New Orleans *vs.* Construction Co., 129 Ibid, 223.
The Alaska, 130 Ibid, 201.
Wheless *vs.* St. Louis *et al.*, 180 Ibid, 379.

This appeal should therefore be dismissed, and the decree rendered by the circuit court in favor of the appellee, affirmed.

JOHN J. WEED,
Attorney for Appellee.